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Tort Liability of Local Governments in Ohio

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The problem of immunity and irresponsibility of governments in matters relating to wrongs or damages inflicted upon innocent citizens has evoked considerable discussion, particularly in the last quarter century. The inequities of the immunity doctrine have been plainly portrayed and adequately condemned by many authorities,[1] but the traditional concept of sovereign freedom from suit is not entirely friendless.[2] There is considerable disagreement as to the extent to which the immunity should be swept away and as to the liability that should replace it. It is even difficult to arrive at a fair appraisal of the present scope of liability imposed, or immunity preserved, in a given jurisdiction because of the manner of enacting appropriate statutes in piecemeal fashion. It will be the purpose of this paper to help define the present areas of liability and immunity of the various local governments in Ohio.

MUNICIPAL CORPORATIONS

In determining liability of governmental units in the absence

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[1] Peterson, *Governmental Responsibility For Torts in Minnesota*, 26 MINN. L. REV. 293, 480, 700, 854 (1942); Fordham and Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LA. L. REV. 720 (1941); Borchard, *Governmental Responsibility in Tort*, 34 YALE L. J. 1, 129, 229 (1925), 36 YALE L. J. 1, 757, 1039 (1926); *Proposed State and Local Statutes Imposing Public Liability in Tort*, 9 LAW & CONTEMP. PROB. 282 (1942); *State and Municipal Liability in Tort,—Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934); Harno, *Tort Immunity of Municipal Corporations*, 4 ILL. L.Q. 28 (1921).

[2] Weber, *Municipal Tort Liability*, 3 PEABODY L. REV. 60 (1938); McCash, *Ex Delicto Liability of Counties in Iowa*, 10 IOWA L. BULL. 16 (1924).

of controlling statutes, the courts usually resort to a test making a distinction between the exercise of governmental and proprietary functions. A similar technique with slightly different emphasis uses a criterion which distinguishes discretionary and ministerial action. The Ohio courts follow the same practice.[3]

Accordingly, as the character of the activity in which the municipality was engaged at the time of the accident falls into the governmental or discretionary category on the one hand, or the proprietary or ministerial on the other, liability is either imposed or rejected. Objections to such an arbitrary and mechanical device arise not only from the difficulty of social justification but also from the inconsistency and confusion in determining which cases go into a given category. There is no unanimity of opinion as to what functions are governmental and what are proprietary, and the courts frequently resort to fine distinctions to escape the rigors of a prior decision. Adding to the uncertainty is the fact that certain things may be used in either a governmental or proprietary capacity.[4]

Generally speaking, matters pertaining to police and fire protection,[5] construction and repair of streets,[6] and the construction of

[3] E.g., Selden v. Cuyahoga Falls, 132 Ohio St. 223, 6 N.E. 2d 976 (1937); Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927); Tolliver v. Newark, 145 Ohio St. 517, 62 N.E. 2d 357 (1945); Note, *Municipal Corporations—Tort Liability,* 9 OHIO ST. L.J. 174 (1948).

[4] Sturzinger v. Sandusky, 28 Ohio App. 263, 162 N.E. 684 (1927); Lebanon v. Loop, 4 Ohio Op. 480, 32 N.E. 2d 458 (1935).

[5] Aldrich v. Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922); Cincinnati v. Butterfield, 14 Ohio App. 395, 32 Ohio C.A. 546 (1921); Frederick v. Columbus, 58 Ohio St. 538 (1898); Thomas v. Findlay, 6 Ohio C.C. 241, 3 Ohio C.D. 435 (1892) (above cases hold there is no liability for negligent operation of police and fire equipment). *Contra:* Fowler v. Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919) (now overruled by the Aldrich case); Schmelzer v. Columbus, 24 Ohio N.P. (N.S.) 90 (1922) (based on the idea that home rule powers made a difference and decided during the period when the holding of Fowler v. Cleveland represented the law). That there is no liability for mobs or riots *see:* Western College v. Cleveland, 12 Ohio St. 375 (1861); Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857 (1885). Also in point are: Wittenbrook v. Columbus, 33 Ohio L. Abs. 586, 35 N.E. 2d 980 (1941) (No liability for death of prisoner due to lack of medical care); Besser v. County Commissioners, 58 Ohio App. 499, 16 N.E. 2d 947 (1938) (No liability for injuries of a prisoner sustained when attacked by another prisoner); Rose v. Toledo, 1 Ohio C.C. (N.S.) 321, 14 Ohio C.D. 540 (1903) (No liability to prisoner in workhouse whose health was ruined by confinement in dungeon); Green v. Commissioners, 3 Ohio C.C. (N.S.) 212, 13 Ohio C.D. 43 (1901) (No liability to minor injured in workhouse while running a defective machine under compulsion); Alvord v. Richmond, 3 Ohio N.P. 136 (1896) (No liability for unlawful arrest or improper care resulting in death).

[6] Boone v. Akron, 69 Ohio App. 95, 43 N.E. 2d 315 (1942); Roetker v. Portsmouth, 64 Ohio App. 146, 28 N.E. 2d 372 (1940); Kohake v. Cincinnati, 59 Ohio App. 403, 18 N.E. 2d 501 (1938); Tetlow v. Youngstown, 49 Ohio

sewers[7] are considered governmental, and no liability is imposed on the municipality for tortious conduct in the carrying on of these activities. Conversely, the construction and operation of public utility services,[8] and the maintenance as contrasted with the construction of sewers[9] are considered proprietary functions and liability is imposed for wrongful acts. Liability is also imposed for stream pollution and flooding[10] because of public improvements irrespective of the character of the activity which caused the damage. Recovery in these cases is based on a theory either of nuisance or expropriation of property without compensation.[11]

It is interesting to note that the earliest Ohio cases adopted an attitude favoring liability of both municipal and county governments without differentiating the various functions they performed.[12] In those cases, the chief concern seemed to be to derive

App. 540, 197 N.E. 426 (1934); Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927); Circleville v. Sohn, 59 Ohio St. 285, 52 N.E. 788 (1898) (held the duty was ministerial but this case was distinguished in the Wooster case). For the effect of the OHIO GENERAL CODE §§3714 and 3714-1 (1938), see *infra* pp. 381, 392 n. 103.

[7] State *ex rel.* Gordon v. Taylor, 149 Ohio St. 427, 79 N.E. 2d 127 (1948); Hutchinson v. Lakewood, 125 Ohio St. 100, 180 N.E. 643 (1932); Bluhm v. Blanck and Gargaro, 62 Ohio App. 451, 24 N.E. 2d 615 (1939).

[8] Interstate Sash and Door Co. v. Cleveland, 36 Ohio Op. 27, 73 N.E. 2d 236 (1947), *aff'd*, 148 Ohio St. 325, 74 N.E. 2d 239 (1947); Barberton v. Miksch, 128 Ohio St. 169, 190 N.E. 387 (1934); Salem v. Harding, 121 Ohio St. 412 at 417, 169 N.E. 457 (1929) (All stating that a water system is a proprietary function); Cleveland v. North Olmsted, 130 Ohio St. 144, 198 N.E. 41 (1935) (bus line is a proprietary function); Columbus v. Lynn, 17 Ohio L. Abs. 658 (1934) (electric light plant is a proprietary function); Werner v. Cincinnati, 3 Ohio C.C. (N.S.) 276, 13 Ohio C.D. 475 (1902) (city liable for the negligent breaking of pipes); Lakewood v. Newell, 16 Ohio C.C. (N.S.) 503, 28 Ohio C.D. 682 (1907) (city liable for conversion of pipes); Cincinnati v. George, 14 Ohio C.C. (N.S.) 447, 23 Ohio C.D. 510 (1911), *aff'd*, 88 Ohio St. 567, 106 N.E. 1050 (1913) (city liable for negligent cutting off of water suply). But the city is not liable for water pressure inadequate to extinguish fires. Blunk v. Dennison Water Supply Co., 71 Ohio St. 250, 73 N.E. 210 (1905); Akron Waterworks Co. v. Brownless, 10 Ohio C.C. 620, 5 Ohio C.D. 1 (1895).

[9] State *ex rel.* Gordon v. Taylor, 149 Ohio St. 427, 79 N.E. 2d 127 (1948); Portsmouth v. Mitchell Co., 113 Ohio St. 250, 148 N.E. 846 (1925). But see Etzensperger and Orschak v. Cleveland, 25 Ohio C.C. (N.S.) 303, 35 Ohio C.D. 254 (1902), holding that the construction of a building is ministerial.

[10] Kirk v. Cincinnati, 25 Ohio N.P. (N.S.) 473 (1925); Mansfield v. Balliett, 65 Ohio St. 451, 63 N.E. 86 (1901); Cleveland v. Beaumont, 4 Ohio D. Rep. 444, Ohio L. Bull. 345 (1875); Rhodes v. Cleveland, 10 Ohio 160 (1840).

[11] Mansfield v. Balliett, *supra* note 10.

[12] Commissioners of Brown County v. Butt, 2 Ohio 349 (1826); Goodloe v. Cincinnati, 4 Ohio 500 (1831); Smith v. Cincinnati, 4 Ohio 514 (1831); Rhodes v. Cleveland, 10 Ohio 160 (1840); McCombs v. Akron, 15 Ohio 474

a just rule that would promote substantial justice. Need was felt for making all corporations responsibile for their wrongs to the same extent as individuals,[13] and justice was thought to be promoted by diffusing among all those who shared in the benefit any losses that might be incidentally inflicted from the exercise of governmental activity.[14]

Gradually, however, the Ohio courts developed the above mentioned tests of functional distinctions[15] and lined up substantially with the English and other American courts, thus starting with the underlying assumption of immunity and engrafting exceptions of liability. The germ of the governmental versus proprietary classification can be ascertained in *Commissioners of Hamilton County v. Mighels.*[16] In this case it was asserted that a county was immune from liability for negligence, but that a municipal or private corporation under like circumstances would be liable. The reasons advanced for this distinction were as follows:

> As before remarked, municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them.
>
> Counties are local subdivisions of a State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. . . .
>
> A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large . . . .[17]

The pronouncement of the dual capacity of the municipality was clearly enunciated a few years later in *Western College v. Cleveland:*[18]

> . . . It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the state — discharging duties incumbent on the state; as to the second, the mu-

(1846), *aff'd after trial,* 18 Ohio 229 (1849).

[13] Goodloe v. Cincinnati, *supra* note 12; Rhodes v. Cleveland, *supra* note 12; McCombs v. Akron, *supra* note 12.

[14] McCombs v. Akron, 15 Ohio 474 (1846) and 18 Ohio 229 (1849).

[15] The governmental vs. proprietary and the discretionary vs. ministerial tests discussed in material preceding note 4 *supra.*

[16] 7 Ohio St. 109 (1857).

[17] Id. at 118, 119.

[18] 12 Ohio St. 375 (1861).

nicipal corporation represents the pecuniary and proprietary interests of individuals.[19]

Except for a brief period from 1919 to 1922 when, by a bold break with precedent, the Supreme Court seemed ready to overthrow the immunity doctrine,[20] the courts of Ohio have steadfastly limited liability by the traditional application of the governmental versus proprietary and discretionary versus ministerial tests. The repudiation in *Fowler v. Cleveland*[21] was itself shortly repudiated in *Aldrich v. Youngstown*,[22] and since then most changes have come from the legislature.

Statutory Liability

The most common basis for imposing liability on the municipality arises from a breach of duty provided for in General Code Section 3714:

> Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision, and control of public highways, streets, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance.[23]

The substance of this statute has been incorporated into Ohio law from an early date, traceable at least to 1852,[24] the first session of the General Assembly under the Constitution of 1851. Moreover, before it was made a general statutory provision, similar provisions were probably included in the special acts incorporating municipalities.[25] The general theory for imposing liability under this section is that the municipality is permitting the existence of a nuisance by failing to keep the public ways clear, open, in repair, and safe for the normal uses thereof.

Nuisance

As noted, the gist of the action under this statute is nuisance and not negligence, although many of the nuisances are predicated upon negligence. This factor, plus the rule that contributory negligence by the plaintiff is a complete defense,[26] at least in the latter cases, results understandably in considerable ambiguity in this area. However, it has been repeatedly held that negligence alone is not

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[19] Id. at 377.

[20] Fowler v. Cleveland, 100 Ohio St. 158, 126 N.E. 72 (1919).

[21] 100 Ohio St. 158, 126 N.E. 72 (1919).

[22] 106 Ohio St. 342, 140 N.E. 164 (1922).

[23] OHIO GEN. CODE §3714 (1938).

[24] 50 OHIO LAWS 244, §63 (1852).

[25] E.g., the act discussed in Langley v. Gallipolis, 2 Ohio St. 108 (1853).

[26] *Infra* note 128.

enough to fasten liability on the municipality.[27] The first problem, then, is to ascertain the meaning of nuisance.

Various definitions of the word nuisance have been propounded by the text writers and accepted by the courts. The Ohio Supreme Court at one time or another has quoted the following with approval:

> The term nuisance, derived from the French word *'nuire'*, to do hurt or to annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights.[28]
>
> Nuisance, something noxious or offensive. Anything not authorized by law which maketh hurt, inconvenience, or damage. It may be (a) *private,* as where one so uses his property as to damage another's, or disturb his quiet enjoyment of it; (b) *public or common,* where the whole community is annoyed or inconvenienced by the offensive acts, as where one obstructs a highway, or carries on a trade that fills the air with noxious and offensive fumes.[29]
>
> Nuisance has been defined as a distinct civil wrong, consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights.[30]

A distinction must be made between absolute nuisances or nuisances *per se,* and nuisances predicated upon negligence.[31] In cases of the former type strict liability is imposed when damage results therefrom, but in cases of the latter type, a want of ordinary care by the defendant plus an absence of contributory negligence by the plaintiff must coexist in order to permit recovery. A searching examination of nuisance law and a significant classification of several types of tortious conduct in this area have been made by Judge Hart in *Taylor v. Cincinnati.*[32] The type of nuisance that is enjoined by Section 3714 may be of either the absolute or qualified

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[27] Snider v. Youngstown, 27 Ohio L. Abs. 231 (1938); Rudibaugh v. Niles, 56 Ohio App. 451, 11 N.E. 2d 193 (1937); Selden v. Cuyahoga Falls, 132 Ohio St. 223, 6 N.E. 2d 976 (1937). On the other hand, both negligence and nuisance need not be shown as nuisance alone is a sufficient predicate of liability. Kremer v. Uhrichsville, 67 Ohio App. 61, 35 N.E. 2d 973 (1940). In this case the court did not distinguish between absolute and qualified nuisance. An instruction requiring proof of negligence in cases of a qualified nuisance is proper. Corbin v. Cleveland, 144 Ohio St. 32 at 36, 56 N.E. 2d 214 (1944). *Cf.* Taylor v. Cincinnati, 143 Ohio St. 426, 55 N.E 2d 724 (1944).

[28] Village of Cardington v. Fredericks, 46 Ohio St. 442, 446, 21 N.E 766, 767 (1889).

[29] *Ibid.*

[30] Taylor v. Cincinnati, 143 Ohio St. 426, 436, 55 N.E. 2d 724, 730 (1944)

[31] Gaines v. Wyoming, 147 Ohio St. 491, 72 N.E. 2d 369 (1947); Interstate Sash and Door Co. v. Cleveland, 148 Ohio St. 325, 74 N.E. 2d 23! (1947); Comment, *Absolute and Qualified Nuisance in Ohio,* 9 OHIO ST L.J. 164 (1948).

[32] 143 Ohio St. 426, 55 N.E. 2d 724 (1944).

variety.[33] The following statement is found in Judge Hart's opinion:

> . . . doubtless if it should dig a deep trench across a street or place an obstruction in the travelled portion thereof in the nighttime without guards, making travel thereon necessarily dangerous, the municipality might be subject to strict liability under the rules above set out; but so long as its conduct is not unlawful or extra hazardous, the municipality is liable for injuries resulting only from its negligent failure to take proper precautions by the removal of obstructions, or by the erection of barriers, guardrails, lights or otherwise, to safeguard travellers against dangerous obstructions, defects, or conditions in streets and other public ways.[34]

An examination of some of the cases under this statute may help clarify the present extent of municipal tort liability in Ohio.

Streets

Various types of actions concerning streets may arise under Ohio General Code Section 3714, a very common type being the allegation of nuisance because of some defect, obstruction, or other condition in the street itself. A large number of these cases involve questions for the jury as to whether the city had notice of the particular defect and was negligent in permitting it to exist. According to the facts, therefore, similar conditions may constitute a nuisance in one case and not in another.

If there is any construction work underway and adequate guardrails and warning devices are not installed, the city will very likely be held liable for any damages that may result therefrom. Thus, recovery was permitted for losses resulting from a ditch,[35] a hole,[36] a cistern construction,[37] and concrete abutments.[38] Like-

[33] Taylor v. Cincinnati, *supra* note 32. *Cf.* Larson v. Cleveland Ry., 142 Ohio St. 20, 50 N.E. 2d 163 (1943) which says that if the statute defines duties in abstract terms, as in Ohio General Code Section 3714, the jury must determine the reasonableness of the conduct.

[34] Taylor v. Cincinnati, *supra* note 32.

[35] Stephens v. Trotwood, 39 Ohio L. Abs. 444, 53 N.E. 2d 647 (1943), *aff'd*, 43 Ohio L. Abs. 157 (1943).

[36] Central Union Telephone Company v. Conneaut, 167 Fed. 274 (C.C.A. 6th 1909) (The city had the hole dug for a utility pole, but neglected to put in the pole for over three months.)

[37] Circleville v. Neuding, 41 Ohio St. 465, 13 Ohio L. Bull. 378 (1885).

[38] Craig v. City of Toledo, 60 Ohio App. 474, 21 N.E. 2d 1003 (1938) (Abutments placed at right angles to the street for foundations for an unfinished bridge. They were difficult to see at night). Similar cases include: Miller v. Dayton, 70 Ohio App. 173, 41 N.E. 2d 728 (1941) (Unlighted pole in the center of the street); Brown v. Columbus, 27 Ohio L. Abs. 677 (1938) (tree in street); City of Hamilton v. Dilley, 120 Ohio St. 127, 165 N.E. 713 (1929) (Unlighted safety zone under construction); Shields v. Cleveland, 21 Ohio C.C. (N.S.) 257, 33 Ohio C.D. 338 (1905) (hole for construction); Cleveland v. King, 132 U.S. 295 (1889) (Building material of abutting owner left in street, jury found notice to city).

wise, liability may be imposed if the city is so negligent in its maintenance that a number of big holes[39] or excessive tar[40] results. Recovery is not limited to those people who use the street as a means of travel from one place to another, but anyone making ordinary or normal use of the street is protected. Hence, a minor may recover for injuries sustained while coasting when the injuries are caused by a "hump" resulting from the laying of a water main.[41] In general, then, it seems that if the condition of the street is such as to substantially increase the risk of danger to the general public using the street in a normal and ordinary manner, and if injuries or losses do result from such a condition, then liability is imposed on the municipality if it actually knew or should have known of the condition.

Conversely, liability is not imposed if the municipality does not have actual or constructive notice of the defect or if the condition is not inherently dangerous. Thus, in the absence of notice, the city is not made liable for a misplaced manhole cover,[42] unlighted building material of an abutting owner,[43] or a hole in the street.[44] Similarly, the existence of certain things in the street that might reasonably be expected to be there are not *per se* nuisances but may entail liability if special facts are shown. Thus a parked truck,[45] an automobile parked in a street set aside for coasting,[46] a safety zone,[47] and a traffic light[48] were all held not to

[39] Erb v. Youngstown, 62 Ohio App. 482, 24 N.E. 2d 629 (1937).

[40] Seiter v. Marion, 28 Ohio L. Abs. 374 (1938).

[41] City of Girard v. Smrek, 52 Ohio App. 135, 3 N.E. 2d 560 (1935). Kercher v. Conneaut, 76 Ohio App. 491, 65 N.E. 2d 272 (1945) (a bicyclist was allowed to recover); *see* Davis v. Shutrump Co., 140 Ohio St. 89, 42 N.E. 2d 663 (1942) (Employee of contractor not permitted to recover because street was closed and he was not using it as a means of travel); Boone v. Akron, 69 Ohio App. 95, 43 N.E. 2d 315 (1942) (City not liable for failure to build sewers and thus abate a nuisance, because the duty under the statute is confined to physical conditions which affect travel and does not extend to conditions created by others which are merely offensive to sight and smell.)

[42] Cleveland v. Amato, 123 Ohio St. 575, 176 N.E. 227 (1931); Cleveland v. Pine, 123 Ohio St. 578, 176 N.E. 229 (1931).

[43] Columbus v. Penrod, 73 Ohio St. 209, 76 N.E. 826 (1906); *cf.* Cleveland v. King, 132 U.S. 295 (1889) in which case liability was imposed.

[44] Connelly v. Youngstown, 27 Ohio L. Abs. 699 (1938); Hunter v. Lakewood, 35 Ohio App. 132, 171 N.E. 842 (1930).

[45] Galluppi v. Youngstown, 55 Ohio App. 331, 9 N.E. 2d 739 (1936).

[46] Mingo Junction v. Sheline, 130 Ohio St. 34, 196 N.E. 897 (1935).

[47] Cleveland v. Gustafson, 124 Ohio St. 607, 180 N.E. 59 (1932); Mossman v. Cincinnati, 10 Ohio Op. 335, 34 N.E. 2d 246 (1936).

[48] Springfield v. Good, 14 Ohio L. Abs. 5 (1933). Other conditions not found to be nuisances include: a traffic sign facing the wrong way, Tolliver v. Newark, 145 Ohio St. 517, 62 N.E. 2d 357 (1945); a traffic light where one side was not working, Martin v. Canton, 41 Ohio App. 420, 180

be nuisances. Furthermore, the municipality is not an insurer and need only keep the street in a reasonably safe condition.[49]

In addition to conditions in the street itself, frequently a nuisance is alleged because of some defect or obstruction in the area in close proximity to the streets. As will be shown, the duty to keep the streets clear from nuisance is applicable to the sidewalks also.[50] Apparently, however, plaintiffs have not been very successful in alleging a violation of the statutory duty when the supposed nuisance is near the sidewalk but away from the street. The Ohio courts uniformly invoke the doctrine of strict construction and guard against extension of liability. Accordingly, it has been held that a hole six feet back of the sidewalk,[51] and a wall along the sidewalk from which a child fell into a hole[52] were not nuisances within the purview of Ohio General Code Section 3714. Similarly, no recovery is permitted for injuries resulting from the negligent regulation of a shooting gallery since such regulation is a governmental function and the gallery is not a nuisance *per se*.[53] It is recognized, however, that the city's duty does not stop with the improved part of the street, but extends to the areas in close proximity thereto so that users of the street may not be unreasonably endangered.[54]

The duty imposed on the municipality under Ohio General Code Section 3714 is not such as to impose liability for the negligence of street repairmen improving the street. Accordingly, a child burned by a fire maintained by street repairmen,[55] and a person injured in a collision with a city repair truck[56] may not recover against the city because such activity is a governmental function and the city is not liable for negligence. On the other hand, the municipality may still be liable under Ohio General Code Section

N.E. 78 (1931); a traffic standard, Ruechert v. Shaker Heights, 25 Ohio L. Abs. 10 (1937).

[49] Dayton v. Glaser, 76 Ohio St. 471, 81 N.E. 991 (1907); Taylor v. Cincinnati, 143 Ohio St. 426, 55 N.E. 2d 724 (1944); Kercher v. Conneaut, 76 Ohio App. 491, 502, 65 N.E. 2d 272, 279 (1945).

[50] *Infra* p. 386.

[51] Village of Mineral City v. Gilbow, 81 Ohio St. 263, 90 N.E. 800 (1909).

[52] Rudibaugh v. Niles, 56 Ohio App. 451, 11 N.E. 2d 193 (1937); Ellis v. Youngstown, 140 Ohio St. 133, 42 N.E. 2d 760 (1942) (a barricade in front of a ravine at a street intersection not a nuisance).

[53] Kreiger v. Doylestown, 25 Ohio App. 286, 158 N.E. 197 (1927).

[54] Karle v. Street Ry., 69 Ohio App. 327, 43 N.E. 2d 762 (1942). (The case was concerned with street railway tracks immediately adjacent to both sides of a narrow, crowned street. Judgment on the verdict for the defendants was affirmed, however.)

[55] Tetlow v. Youngstown, 49 Ohio App. 540, 197 N.E. 426 (1934).

[56] Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927). The rule of this case has now been changed by Ohio General Code Section 3714-1, *infra* p. 392 n. 103.

3714 although the street or highway was constructed and is maintained by another political unit.[57]

Sidewalks

The same type of duty that is imposed on the municipality by Ohio General Code Section 3714 to keep the streets free from nuisance is likewise imposed in relation to the sidewalks. Similar rules of construction apply so that liability is imposed if the city has notice of the defect or disrepair and is negligent in not making re-

[57] Stephens v. Trotwood, 39 Ohio L. Abs. 444, 53 N.E. 2d 647 (1943), *motion to certify record overruled,* 43 Ohio L. Abs. 157 (1943) (village liable for nuisance in state highway running through village when it did not warn and protect the public from an excavation); O'Neill v. Cleveland, 145 Ohio St. 563, 62 N.E. 2d 353 (1945) (the county and municipality are not joint tortfeasors but apparently recognizing that both could be liable although on different bases; cases cited in notes 136 and 148 recognize the duties and liabilities of both the county and municipality in relation to bridges, but a valid distinction could be made between roads and bridges in that Ohio General Code §§ 2421, 7557, and 7563 (1938) impose special duties on the county in relation to bridges and guard rails. A distinction can also be made between losses resulting from the construction or repair itself, in which case the political division doing the work might be solely liable, Sheppard v. Commissioners, 6 Ohio L. Abs. 153, 26 Ohio L. Rep. 81 (1927), and losses resulting from failure to keep the road in repair and free from nuisance after it has been constructed, in which case the municipality might also be liable, Bruns v. Commissioners, 52 Ohio App. 325, 334, 335, 3 N.E. 2d 675, 679 (1936); Andrews v. Georgetown, 34 Ohio App. 79, 170 N.E. 450 (1929). Some cases have held the municipality responsible on the theory that under recent statutes it had to consent to the other unit's construction of the road and so was responsible just as if it had done the work itself, Andrews v. Georgetown, 34 Ohio App. 79, 170 N.E. 450 (1929); Sroka v. Green Cab Co., 35 Ohio App. 438, 172 N.E. 531 (1929), *dismissed on other grounds,* 122 Ohio St. 45 (1930), but there is also authority to the effect that such consent is not a sufficient predicate of liability, Bruns v. Commissioners, *supra*; Sheppard v. Commissioners, *supra.* A holding that only the state is responsible for failure to repair a state highway running through a village, Younts v. Avon Lake, 19 Ohio App. 182, 3 Ohio L. Abs. 591 (1925), has been distinguished and liability imposed on the basis that the present applicable statutes are different from those then in effect which gave exclusive control to the state, Bruns v. Commissioners, 52 Ohio App. 325, 332 (1936), Grove City v. Ream, 5 Ohio L. Abs. 181 (1927). It has been held that a county road loses its character as such when it is located within a municipality and that only the municipality is liable for defects in such portion of a county road as is located within its corporate limits, Sroka v. Green Cab Co., *supra.* On the other hand, it has been held that there is no liability of the county for a state highway, Weiher v. Phillips, 103 Ohio St. 249, 133 N.E. 67 (1921). Although the division of responsibility between various political units in relation to roads maintained by the county or the state and running through a municipality is not as definite as might be desired, it would seem that at least in some cases liability would be imposed on the municipality. Liability might also be imposed on another political unit in a proper case.

pairs.[58] Liability may even be imposed where the dangerous condition is caused by poor planning and negligent construction or repairs.[59] Here too, apparently, the city's duty extends somewhat beyond the actual paving of the walk, the test probably being whether or not one can make normal use of the walk without being endangered.[60] Dangerous conditions caused by the natural elements do not create liability.[61]

Bridges

The duty to keep bridges open, in repair, and free from nuisance is likewise specifically enjoined upon municipalities by Ohio General Code Section 3714. Similar to the liability imposed for the poor

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[58] Nairn v. Columbus, 35 Ohio L. Abs. 45 (1941) (hole in sidewalk); Dzuracky v. City of Campbell, 64 Ohio App. 521, 29 N.E. 2d 49 (1939) (broken sidewalk); Photokos v. Youngstown, 23 Ohio L. Abs. 622 (1936) (sidewalk trapdoor); Cleveland v. Hanson, 15 Ohio App. 409 (1921), *aff'd*, 105 Ohio St. 646, 138 N.E. 925 (1922) (worn out cellar way covering); Toledo v. Radbone, 3 Ohio C.C. (N.S.) 382, 13 Ohio C.D. 268 (1901), *aff'd*, 68 Ohio St. 687, 70 N.E. 1117 (1903) (constructive notice applied); Wilhelm v. Defiance, 58 Ohio St. 56, 50 N.E. 18 (1898) (city ordered lot owner to repair his walk, and he negligently did so); Toledo v. Higgins, 12 Ohio C.C. 541, 5 Ohio C.D. 485 (1896) (nonconformity to grade).

[59] Circleville v. Sohn, 59 Ohio St. 285, 52 N.E. 788 (1898).

[60] Village of Mineral City v. Gilbow, 81 Ohio St. 263, 90 N.E. 800 (1909) (no liability where hole was six feet back of sidewalk); Rudibaugh v. Niles, 56 Ohio App. 451, 11 N.E. 2d 193 (1937) (no liability where there was a retaining wall 4" higher than the sidewalk and 16" wide between sidewalk and depression in the ground); Cavey v. Cincinnati, 12 Ohio C.C. (N.S.) 285, 22 Ohio C.D. 397 (1909), *aff'd without opinion*, 85 Ohio St. 450, 98 N.E. 1121 (1911) (sidewalk was so near an unguarded retaining wall that the city was liable for damages sustained when a pedestrian fell over the wall); Sidney v. Schmidt, 14 Ohio C.C. (N.S.) 417, 23 Ohio C.D. 128 (1910) (city liable to pedestrian who tripped on loose stones and fell over culvert which was not equipped with guard rails); Barnesville v. Ward, 85 Ohio St. 1, 96 N.E. 937 (1911) (liability imposed where a low wire was strung between sidewalk and parkway running over to the curb); McCurdy v. Newark, 10 Ohio N.P. (N.S.) 526, 25 Ohio Dec. 666 (1910) (similar situation to Barnesville case but liability not imposed); other cases in point are: Kelley v. Columbus, 41 Ohio St. 263 (1884); Cleveland v. Parschem, 9 Ohio L. Abs. 694 (1931); Hubler v. Dayton, 26 Ohio L. Abs. 679 (1938). The problem is discussed by Judge William L. Hart, now on the Ohio Supreme Court, in *Review of Ohio Case Law for 1937*, 10 Ohio Op. 169 (1937).

[61] Smith v. Cuyahoga Falls, 73 Ohio App. 22, 53 N.E. 2d 670 (1943) (water and ice); McCave v. Canton, 140 Ohio St. 150, 42 N.E. 2d 762 (1942) (city not liable for the natural accumulations of snow and ice); Burlinghauser v. Laisy, 11 Ohio N.P. (N.S.) 348, 22 Ohio Dec. 238 (1911); Norwalk v. Tuttle, 73 Ohio St. 242, 76 N.E. 617 (1906); Stamberger v. Cleveland, 22 Ohio C.C. 65, 12 Ohio C.D. 42 (1901); Chase v. Cleveland, 44 Ohio St. 505, 9 N.E. 225 (1886); Cincinnati v. Grebner, 7 Ohio C.C. (N.S.) 11, 15 Ohio C.D 700 (1904) (liability was imposed where ice resulted from a broken water main).

planning of a sidewalk,[62] the bridge itself may be so constructed as to constitute a nuisance. Thus, a narrow bridge, so located that a concrete pilaster separating the vehicular and pedestrian traffic is situated approximately in the middle of one of the road's traffic lanes, is a nuisance and the city is liable for resulting damages.[63] Similarly, a bridge might become a nuisance by functional obsolescence. Thus, liability was imposed where a boy, riding atop some beer cases on a truck, was killed when he struck his head against the lower rail of an overhead railroad bridge.[64] The bridge, adequate when built, became a nuisance by virtue of the increased size of vehicles. Where the bridge is in such a state of disrepair as to collapse when a pedestrian walks thereon, recovery is permitted.[65] Failure to erect guard rails along a bridge or its approaches may subject the city to liability[66] although there is no specific mention of guard rails in connection with the duties of the municipality.[67]

Sewers

Although Ohio General Ohio Section 3714 does not specifically provide that sewers shall be kept open, in repair, and free from nuisance, it is clear that liability will be imposed if they are not so maintained. Responsibility can be predicated on the theory that the defect of the sewer causes a nuisance in the street,[68] that the sewer is an aqueduct within the express provisions of the statute,[69] or that the municipality is liable for negligence in performing the proprietary function of maintaining sewers.[70] Except for the actual construction of a sewer which is considered a governmental function,[71] there is ample basis for holding the city responsible for losses arising out of its lack of ordinary care with respect to sewers.

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[62] Circleville v. Sohn, 59 Ohio St. 285, 52 N.E. 788 (1898).

[63] Kocher v. Barberton, 140 Ohio St. 240, 42 N.E. 2d 977 (1942); Springfield v. McDaniel, 45 Ohio App. 87, 186 N.E. 741 (1932); But the *county* is not liable for damages resulting from a narrow bridge. Allison v. Commissioners of Crawford County, 19 Ohio L. Abs. 74 (1935).

[64] Yackee v. Napoleon, 135 Ohio St. 344, 21 N.E. 2d 111 (1939).

[65] Lengyel v. Brandmiller, 139 Ohio St. 478, 40 N.E. 2d 909 (1942).

[66] Strobel v. Cincinnati, 32 Ohio App. 333, 168 N.E. 543 (1929) (verdict for the city was permitted to stand in spite of prejudicial instructons because plaintiff failed to show proximate cause and directed verdict would have been proper); Commissioners v. Shurts, 10 Ohio App. 219 (1918); Boyd v. Cambridge, 4 Ohio C.C. 519, 2 Ohio C.D. 683 (1890).

[67] The duty is specifically imposed on the county. Ohio Gen. Code §7563 (1938).

[68] Portsmouth v. Mitchell Co., 113 Ohio St. 250, 148 N.E. 846 (1925).

[69] Zolg v. Deer Park, 18 Ohio Op. 131, 5 Ohio Supp. 193 (1944).

[70] Portsmouth v. Mitchell Co., *supra* note 68.

[71] Hutchinson v. Lakewood, 125 Ohio St. 100, 180 N.E. 643 (1932); Bluhm v. Blanck and Gargaro, Inc., 62 Ohio App. 451, 24 N.E. 2d 615 (1939).

Parks, Ponds and Swimming Pools

The city is liable for nuisance in and around public parks, ponds or swimming pools under the mandatory provisions of Ohio General Code Section 3714. Such facilities are included within the term "public grounds" which specifically must be kept nuisance free. The decisions as to parks apparently are not uniform. In one case recovery was denied to a child injured from a defective horizontal bar, the court implying, if not specifically asserting, that such defective equipment is not a nuisance. The child's father, a non-resident, had paid the city one dollar for the privilege of using the playground. The court held that a breach of contract action could not be brought by the father as next friend of the child because such a contract (to maintain the equipment in a safe condition), entered into by the city, is *ultra vires* and unenforceable.[72] A contrary result had been reached in another case in which the city was held liable for injuries resulting from a defective slide.[73] The court simply held that the slide in that condition was a public nuisance and the city was liable for not abating it.[74] Recovery was permitted against a city for allowing corrugated steel pipes to be piled up in a park in such a manner that a young boy was killed while playing on them.[75] Permitting an unexploded fireworks bomb to be left in a park has been held to render the city liable on the basis of a public nuisance when the bomb was found and exploded.[76] Similarly, the exhibition of a fireworks display with bombs of sufficient powder to kill a man may constitute a nuisance irrespective of the degree of care used.[77] A discus, on the other hand, is said to be not an inherently dangerous instrument; therefore keeping one with other playground equipment does not create liability in an event injury results from its use.[78] Apparently the more common holding is that a park represents a governmental function and the city is liable only if a nuisance exists.[79] Considera-

[72] Thrasher v. Cincinnati, 28 Ohio Op. 97, 13 Ohio Supp. 143 (1944).

[73] Schmitt v. Cheviott, 31 Ohio N.P. (N.S.) 12 (1933).

[74] *Ibid.*

[75] Gottesman v. Cleveland, 142 Ohio St. 410, 52 N.E. 644 (1944).

[76] Cleveland v. Ferrando, 114 Ohio St. 207, 150 N.E. 747 (1926). In Schwarz v. Cincinnati, 55 Ohio App. 123, 9 N.E. 2d 3 (1936), however, liability was not imposed partly on the ground that no notice was shown, and so judgment on a verdict for the city was permitted to stand.

[77] Harris v. Findlay, 59 Ohio App. 375, 18 N.E. 2d 413 (1938).

[78] Aimslee v. Bellevue, 73 Ohio App. 577, 57 N.E. 2d 279 (1943).

[79] Cases holding the maintenance of a park to be a governmental function: Sailor v. Columbus, 23 Ohio L. Abs. 417 (1936); Harris v. Findlay, *supra* note 78; Thrasher v. Cincinnati, 28 Ohio Op. 97, 13 Ohio Supp. 143 (1944); Cleveland v. Walker, 52 Ohio App. 477, 3 N.E. 2d 990 (1936). *But see* Harff v. Cincinnati, 11 Ohio N.P. (N.S.) 41, 25 Ohio Dec. 301 (1911) (language contra but the assertion unnecessary for the decision). In Gor-

tions in determining the existence of a nuisance include the probability or likelihood that the condition or disrepair will inflict damages on the public in the normal use of the park, and the knowledge and negligence on the part of the municipality in permitting the dangerous condition to continue.

There are several cases involving the liability of the municipality for injuries sustained at public ponds. Apparently, there is no duty on the part of the city to construct guard rails or barriers around such bodies of water even though they are located in public parks.[80] Whether there is a walk around the edge of the water[81] or whether the water is on improved or unimproved land[82] makes no difference. The pond in either case is not a nuisance.[83] In accordance with the previously mentioned rule that liability is not imposed for hazards resulting naturally from the elements,[84] a municipality is not responsible for drownings resulting from the breaking of ice made unsafe by warm weather.[85]

Misleading markings as to the depth of the water near diving boards in a municipal swimming pool may be the basis for liability on a nuisance theory,[86] but the statute is strictly construed and more than negligence must be shown.[87] The absence of markings, on the other hand, does not constitute a nuisance if the general layout of the pool is such that one would ordinarily expect the shallow water at that particular place.[88] Again, the test seems to

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such v. Springfield, 43 Ohio L. Abs. 83, 61 N.E. 2d 898 (1945), it was held that maintenance of a golf course and a club house within a public park constituted a proprietary function of the government. It was not asserted that the park itself was a proprietary function.

[80] Sailor v. Columbus, 23 Ohio L. Abs. 417 (1936).

[81] *Ibid.*

[82] Sailor v. Columbus, *supra* note 80; Toledo v. Cummings, 121 Ohio St. 37, 166 N.E. 897 (1929).

[83] Sailor v. Columbus, *supra* note 80; Toledo v. Cummings, *supra* note 82.

[84] See note 61 *supra.*

[85] Cleveland v. Walker, 52 Ohio App. 477, 3 N.E. 2d 990 (1936).

[86] Sansone v. Cleveland, 31 Ohio L. Abs. 246 (1940). The depth of the water was marked as ten feet, but where deceased struck bottom in diving off a 15 ft. diving board, the water was only four and one-half feet deep.

[87] Selden v. Cuyahoga Falls, 132 Ohio St. 223, 6 N.E. 2d 976 (1937).

[88] Selden v. Cuyahoga Falls, *supra* note 87. (A float with a diving board about four feet above the water was located in the center of the pool where the water was five feet deep. A low board from one to two feet above the water was located along the side of the pool where the water was only three feet deep. The court seemed to think that anybody would expect the water to be shallow under this low board which would be for children's use, but from which plaintiff attempted a jack-knife dive.)

be the likelihood of endangering the public in the ordinary use of the pool.[89]

Blasting

Governmental liability for damages resulting from blasting is imposed in accordance with the principles applicable to tort liability generally. If the blasting is being conducted in the furtherance of a proprietary function, liability is imposed for negligence,[90] but if the work being performed is done in the furtherance of a governmental function, the municipality is accorded immunity.[91] However, the blasting may be conducted in such a manner as to constitute a nuisance, in which case liability is imposed.[92] Blasting is not a nuisance per se,[93] however, and therefore sufficient facts must be alleged to show nuisance. It has been suggested that blasting of a sufficient intensity to damage nearby property is itself enough to constitute such nuisance.[94] Since only municipalities are covered by statute which makes liability depend on nuisance,[95] recovery against other governmental units engaged in blasting activities might not be allowed unless the unit were engaged in the performance of a proprietary function.

Miscellany

A city is not liable for the negligent treating of a patient at a city hospital,[96] but it may be liable for the wrongful revocation of a permit to remove a building.[97] In the absence of a statute as at present, the municipality is not responsible for damages caused by mobs or riots. The preservation of the peace is a governmental

[89] Selden v. Cuyahoga Falls, 132 Ohio St. 223, 6 N.E. 2d 976 (1937); Sansone v. Cleveland, 31 Ohio L. Abs. 246 (1940).

[90] Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408 (1878); Louden v. Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914).

[91] Snider v. Youngstown, 27 Ohio L. Abs. 231 (1938); Hutchinson v. Lakewood, 125 Ohio St. 100, 180 N.E. 643 (1932). *But see* Chapman v. Lepotsky, 23 Ohio C.C. (N.S.) 90, 34 Ohio C.D. 132 (1912) (apparently contra but the doctrine of nonliability because of the character of the work was not invoked).

[92] Crino v. Campbell, 68 Ohio App. 391, 41 N.E. 2d 583 (1941).

[93] Snider v. Youngstown, 27 Ohio L. Abs. 231 (1938); Crino v. Campbell, *supra* note 92.

[94] Crino v. Campbell, 68 Ohio App. 391 at 394, 41 N.E. 2d 583, 585 (1941); Snider v. Youngstown, 2 Ohio L. Abs. 231 (1938).

[95] Ohio General Code Section 3714 pertains only to municipalities.

[96] Lloyd v. Toledo, 42 Ohio App. 36, 180 N.E. 716 (1931).

[97] Cleveland v. Lenze, 27 Ohio St. 383 (1875) (The city gave plaintiff permission to remove his building to another lot because of non-conformity to fire ordinance. When he got the building to the new location, the permit was revoked and the plaintiff ordered to tear down the building. Plaintiff was permitted to recover his damages).

function and so the city is immune from liability.[98] A city may be liable for the maintenance of a rifle range on public property although by a proper exercise of the police power it would abate a nuisance. The maintenance of such a range is contrary to Ohio General Code Section 12635, and thus it is proper for the jury to decide whether it is a nuisance, and if so, whether such nuisance is the proximate cause of the injury.[99] From early times the municipality has been held liable for damages resulting from change of grade.[100] Even if no grade has previously been established, the lot owner may still recover, but his recovery is limited to the difference between what his damages would have been if a reasonable grade had been established, and what they are under the unreasonable grade as established.[101] The city is not liable, however, for damages caused by increased flow of water resulting from private improvement of property within the area of natural drainage.[102]

Motor Vehicles

Ohio General Code Section 3714-1[103] provides in substance that

[98] Western College v. Cleveland, 12 Ohio St. 375 (1861); Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857 (1885).

[99] Gaines v. Wyoming, 147 Ohio St. 491, 72 N.E. 2d 369 (1947). Shevetz v. Campbell, 69 Ohio App. 479, 44 N.E. 2d 141 (1940) (City not liable unless the defect was the proximate cause of the injury).

[100] Goodloe v. Cincinnati, 4 Ohio 500 (1831); McCombs v. Akron, 15 Ohio 474 (1846), *aff'd*, 18 Ohio 229 (1849); Metcalf v. Elyria, 14 Ohio C.C. (N.S.) 465, 23 Ohio C.D. 151 (1910), *aff'd*, 84 Ohio St. 501 (1911); Johns v. Cincinnati, 45 Ohio St. 278, 12 N.E. 801 (1887).

[101] Hurst v. Akron, 23 Ohio C.C. (N.S.) 591, 34 Ohio C.D. 416 (1912); Middletown v. Doty, 6 Ohio App. 333, 28 Ohio C.A. 465 (1917) (No recovery permitted because it was not shown the city established an unreasonable grade).

[102] Hamilton v. Ashbrook, 62 Ohio St. 511, 57 N.E. 239 (1900); Springfield v. Spence, 39 Ohio St. 665 (1883). But the city is liable for the overflow of surface water caused by public construction. Andrews v. Georgetown, 34 Ohio App. 79, 170 N.E. 450 (1929); Toledo v. Lewis, 32 Ohio L. Bull. 378 (1894), and 17 Ohio C.C. 588, 9 Ohio C.D. 451 (1895); McBride v. Akron, 12 Ohio C.C. 610, 6 Ohio C.D. 739 (1894).

[103] The text of OHIO GEN. CODE §3714-1 (1938) is as follows:

> Every municipal corporation shall be liable in damages for injury or loss to persons or property and for death by wrongful act caused by the negligence of its officers, agents or servants while engaged in the operation of any vehicles upon the public highways of this state under the same rules and subject to the same limitations as apply to private corporation for profit but only when such officer, agent or servant is engaged upon the business of the municipal corporation.
>
> Provided, however, that the defense that the officer, agent, or servant of the municipality was engaged in performing a governmental function, shall be a full defense as to negligence of members of the police department engaged in police duties, and as to the negligence of members of the fire department while engaged in duty at a fire or while proceeding toward a place where a fire is in progress or is believed to be in progress or in answering any other emergency alarm. And provided, further, that a

the municipality will be liable in damages to the same extent as private individuals and corporations for injuries or losses caused by the negligence of its officers, agents, or servants in operating motor vehicles upon the public highways. This statute was enacted in 1933 presumably to effect a change in the law as applied in the *Wooster* and *Piqua* cases.[104] Under this statute, apparently, recovery is permitted if an agent of the city is driving on city business, even his own private car,[105] and negligently causes loss or injuries to somebody else. The governmental-proprietary distinction is no longer of any moment where a highway tort is concerned except in the two cases specifically provided for in the statute. The second paragraph of Ohio General Code Section 3714-1 provides that the defense of performing a governmental function is a complete defense where the tort occurs while the police are engaged in police duties and the firemen are going to a fire or answering an emergency call. It is also provided that individual members of the police and fire departments are not personally liable for losses occasioned by the operation of motor vehicles while they are engaged in governmental duties.[106] Thus one might find himself without any recourse at all, when injured by wrongful act of a public employee. Liability is

fireman shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle in the performance of a governmental function and provided further that a policeman shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.

[104] Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927) (no liability for negligent operation of repair truck); Thompson v. Piqua, 13 Ohio L. Abs. 548 (1932) (no liability for negligent operation of truck engaged in hauling material for street repair); see also Matcoski v. Canton, 54 Ohio App. 234, 237, 6 N.E. 2d 795, 797 (1935).

The 1933 act (115 Ohio Laws 206) did not exempt policemen and firemen from personal liability, but the provisions as to municipal liability and immunity were the same as in the present statute. In 1935 (116 Ohio Laws 507) the statute was amended by adding the provisions exempting firemen from personal liability in those situations where the municipality was not liable; and in 1937 (117 Ohio Laws 482) a similar provision was added exempting policemen from personal liability.

[105] 1934 OPS. ATT'Y GEN. (Ohio) No. 2184.

[106] McDermott v. Irwin, 148 Ohio St. 67, 73 N.E. 2d 86 (1947) held it was complete defense in an action against the policeman that at the time of the accident he was answering an emergency call.

In an action against the city, it was held that a fire truck, enroute to an engine house other than the one at which it was usually stationed, to replace a fire truck called to a fire, is answering an emergency call as contemplated in Section 3714-1, and a person injured in a collision with such fire truck cannot hold the city liable. Staudenheimer v. Newark, 62 Ohio App. 255, 23 N.E. 2d 845 (1939); *accord,* 1942 OPS. ATT'Y GEN. (Ohio) No. 5302.

imposed for all other negligent operation of motor vehicles engaged to carrying on municipal business.[107]

Notice Requirement

In order to hold a municipal or other local governmental unit liable for failure to abate a nuisance or keep in repair, it must be shown that the public body had notice of the defect or disrepair.[108] Either actual or constructive notice is sufficient.[109] If notice to the public unit is predicated upon notice to an agent, it is necessary to show that the agent was within the scope of his authority, and that it was his duty to receive such notice at the time he acquired the information.[110] Notice to a policeman is ordinarily not sufficient even though a rule of the police department requires the police officer to report such defects.[111] Notice of a general defect does not constitute notice of a particular one unless they are of the same general character or the latter is a concomitant of the former.[112] If the defect is in the original construction, or if the local government has actively caused the nuisance, liability is imposed irrespective of notice.[113] When with reasonable diligence, the governmental unit might have discovered the defective condition, it is held liable, regardless of actual notice. Thus, if the defect or disrepair has existed for a long time, and is not latent, liability may be imposed;[114]

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[107] OHIO GEN. CODE §3714-1 (1938), for text see note 103 *supra.*

[108] Bello v. Cleveland, 106 Ohio St. 94, 138 N.E. 526 (1922); Groveport v. Bradfield, 2 Ohio C.C. 145, 1 Ohio C.D. 411 (1887), *aff'd,* 30 Ohio L. Bull. 351 (1893).

[109] Cases cited note 108 *supra*; Guernsey County Commissioners v. Black, 25 Ohio C.C. (N.S.) 415, 24 Ohio C.D. 164 (1911), *aff'd,* 88 Ohio St. 587 (1913).

[110] Cleveland v. Payne, 72 Ohio St. 347, 352, 74 N.E. 177, 178 (1905).

[111] Cleveland v. Payne, 72 Ohio St. 347, 74 N.E. 177 (1905); Columbus v. Penrod, 73 Ohio St. 209, 213, 76 N.E. 826 (1906). Rule recognized in 1945 OPS. ATT'Y GEN. (Ohio) No. 361.

[112] Shelby v. Clagett, 46 Ohio St. 549, 22 N.E. 407 (1889); Winkler v. Columbus, 48 Ohio L. Abs. 161, 163, 164, 71 N.E. 2d 729, 731 (1947), *reversed on grounds of contributory negligence,* 149 Ohio St. 45, 36 Ohio Op. 367 (1948).

[113] Cloud v. City of Fremont, 72 Ohio App. 193, 51 N.E. 2d 39 (1943); Harris v. Findlay, 59 Ohio App. 375, 18 N.E. 2d 413 (1938); Hewitt v. Cleveland, 21 Ohio C.C. 505, 11 Ohio C.D. 710 (1901), *reversed,* 67 Ohio St. 534 (1902); Gable v. Toledo, 16 Ohio C.C. 515, 9 Ohio C.D. 63 (1895); Alliance v. Campbell, 17 Ohio C.C. 595, 6 Ohio C.D. 762 (1895), *aff'd,* 53 Ohio St. 650, 44 N.E. 1132 (1895); Middleport v. Taylor, 2 Ohio C.C. 366, 369, 1 Ohio C.D. 534 (1887); Circleville v. Neuding, 41 Ohio St. 465 (1885).

[114] Wiest v. Cincinnati, 2 Ohio L. Abs. 617 (1924); Cincinnati v. Armstrong, 14 Ohio C.C. (N.S.) 343, 23 Ohio C.D. 414 (1911), *aff'd* 88 Ohio St. 568 (1913); Toledo v. Radbone, 3 Ohio C.C. (N.S.) 382, 13 Ohio C.D. 268 (1901), *aff'd,* 68 Ohio St. 687 (1903); Cincinnati v. Frazier, 18 Ohio C.C. 50, 9 Ohio C.D. 487 (1899), *aff'd,* 19 Ohio C.C. 604, 10 Ohio C.D. 524 (1899).

otherwise if the condition has existed for a very brief time.[115] In doubtful cases where the type of defect known to the municipality is in dispute, or where the defect has existed for an intermediate period, the question of notice is a matter of fact to be resolved by the jury.[116] Public ways and grounds are usually not in such exclusive control of the governmental unit that the doctrine of *res ipsa loquitur* may be applied.[117] Thus, the simple showing of a condition such as a misplaced manhole cover is not sufficient to shift the burden of going forward from the plaintiff. Instead, some fault of the defendant must be shown in the presentation of the plaintiff's case.[118] Furthermore, the public body is given a reasonable time to repair the defect after it receives notice thereof.[119] The requirement of notice is maintained even in cases of nuisance *per se,* but a petition is not demurrable when it alleges notice even though the supporting facts seem to negative it.[120] On the other hand, however, a verdict for the defendant is permitted to stand if the fact of notice is in dispute and it is reasonable to conclude the jury resolved the fact against the plaintiff.[121] The notice requirement may be more easily understood if it is remembered that liability is predicated on fault and there can be no fault unless the governmental unit knew or should have known of the particular defect or dangerous condition which it should have corrected. Such a showing of notice is a prerequisite of plaintiff's case.

Conditions Precedent to Recovery

In many states the municipality has power to attach conditions precedent before liability is imposed.[122] A contrary result prevails in Ohio. In *Wilson v. East Cleveland,*[123] the defense was interposed that the plaintiff had not filed notice of her claim with the city commission within 30 days after the accident in accordance with

[115] McCave v. Canton, 140 Ohio St. 150, 155-6, 42 N.E. 2d 762, 765, 766 (1942); Leipsic v. Gerdeman, 68 Ohio St. 1, 67 N.E. 87 (1903).

[116] Winkler v. Columbus, 48 Ohio L. Abs. 161, 71 N.E. 2d 729 (1947); *reversed on grounds of contributory negligence,* 149 Ohio St. 39, 36 Ohio Op. 364 (1948); Kittredge v. Cincinnati, 6 Ohio C.C. (N.S.) 646, 18 Ohio C.D. 100 (1905).

[117] Cleveland v. Pine, 123 Ohio St. 578, 176 N.E. 229 (1931); Cleveland v. Amato, 123 Ohio St. 575, 176 N.E. 227 (1931).

[118] Note 117, *supra.*

[119] Kittredge v. Cincinnati, 6 Ohio C.C. (N.S.) 646, 647, 18 Ohio C.D. 100 (1905); Schneider v. Cincinnati, 4 Ohio N.P. (N.S.) 57, 16 Ohio Dec. (N.P.) 206 (1905); McGovern v. Mt. Vernon, 22 Ohio L. Bull. 363 (1889).

[120] Cleveland v. Ferrando, 114 Ohio St. 207, 150 N.E. 747 (1926).

[121] Schwarz v. Cincinnati, 55 Ohio App. 123, 9 N.E. 2d 3 (1936).

[122] *Note,* 11 U. OF CIN. L. REV. 113 (1937). The problem is further discussed in Shroeder, *Administration of Municipal Tort Liability in Cleveland, infra* p. 412.

[123] 121 Ohio St. 253, 167 N.E. 892 (1929).

a provision of the city charter. The court held that the reasonableness of the condition was not in issue, but rather the power of the municipality to attach any condition at all. The court then asserted that the duty to keep the streets and public grounds open and free from nuisance was imposed by state law and only the state could relieve any of the local governments from any of the burdens incident thereto. Inherent in the decision is the idea that the charter provision qualified the right and not merely modified the remedy. The decision is apparently based on the proposition that general laws imposing duties on local subdivisions in relation to highways and public grounds constitute an exercise of the police power superior to any local regulations and are not included within the grant of home rule powers.[124] Hence the charter provision requiring notice to be filed within thirty days was held unconstitutional since it was in conflict with state law.[125]

Defenses

Contributory negligence by the plaintiff will bar recovery in nuisance actions against the municipality under Ohio General Code Section 3714 where the alleged nuisance is based on negligence of the municipality.[126] If the supposed nuisance is based on an inherently dangerous instrumentality or the commission of an unlawful act so as to constitute an absolute nuisance, certain types of contributory negligence may still constitute a defense. Mere negligence in failure to discover the danger and avoid it should not preclude recovery, but the type of conduct that is sometimes called assumption of risk or wanton disregard of one's own safety should constitute a good defense.[127] Thus, apparently, the type of contributory

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[124] OHIO CONSTITUTION, Art. XVIII, §3, providing as follows:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

See criticism of the Wilson case in Fordham and Asher, *Home Rule Powers in Theory and Practice,* 9 OHIO ST. L.J. 18, 59 (1948).

[125] Wilson v. East Cleveland, 121 Ohio St. 253, 167 N.E. 892 (1929).

[126] Winkler v. Columbus, 149 Ohio St. 39, 36 Ohio Op. 364 (1948); Morris v. Cleveland, 44 Ohio L. Abs. 215, 64 N.E. 2d 134 (1945), *appeal dismissed,* 146 Ohio St. 186, 32 Ohio Op. 82 (1945); Gottesman v. Cleveland, 142 Ohio St. 410, 52 N.E. 2d 644 (1944); Branscomb v. Miamisburg, 32 Ohio L. Abs. 473 (1940); Cincinnati v. Metze, 40 Ohio App. 110, 178 N.E. 222 (1931); Norwalk v. Tuttle, 73 Ohio St. 242, 76 N.E. 617 (1906); Leber v. Kelley Island Line and Transportation Co., 21 Ohio C.C. 773, 11 Ohio C.D. 568 (1901), *aff'd,* 67 Ohio St. 553, 67 N.E. 1099 (1903); Schaffler v. Sandusky, 33 Ohio St. 246 (1877). But the negligence of the driver is not imputed to the passenger. Becker v. Cincinnati, 24 Ohio L. Abs. 695 (1936); Miller v. Dayton, 70 Ohio App. 173, 41 N.E. 2d (1941).

[127] The general principles concerning the scope of contributory negligence, assumption of risk, and related defenses can be found in PROSSER,

negligence which is evidenced by the lighting of an unexploded fireworks bomb with full appreciation of the danger would bar recovery.[128]

The fact that the work was done by an independent contractor may in many cases be used to avoid liability on the part of the employer. That rule, however, clearly has no application where the work to be performed is necessarily dangerous or where the obligation rests upon the employer to keep the subject of the work in a reasonably safe condition.[129] Since the duty is directly imposed on the municipality to keep the streets and public grounds free from nuisance and since so many of the normal hazards incident to construction or other work would be inherently dangerous if located in the street or other public grounds, the exception to the independent contractor rule would be applicable to at least a large percentage of cases arising under Ohio General Code Section 3714, and liability would be imposed. The answer that the city has no funds is not a defense in Ohio. The Uniform Bond Act makes specific provision for issuing bonds to satisfy a judgment based on a tort action.[130]

COUNTIES

In the absence of statute, Ohio has for many years followed the common law rule that a county is not liable for negligence. An

TORTS, 400 *et seq.*, 463 *et seq.* (1941); Herrig v. Cleveland, 16 Ohio C.C. (N.S.) 209, 27 Ohio C.D. 643 (1907).

[128] Schwartz v. Cincinnati, 55 Ohio App. 123, 9 N.E. 2d 3 (1936). Recovery was denied. In affirming judgment for the city, it was held not error to instruct the jury on contributory negligence without mentioning the standard of care required of an infant. The unexploded bomb was apparently a nuisance *per se* as in Cleveland v. Ferrando, 114 Ohio St. 207, 150 N.E. 747 (1926), where the question of contributory negligence was not raised. Neither was the question of contributory negligence raised in the cases of Gaines v. Wyoming, 147 Ohio St. 491, 72 N.E. 2d 369 (1947) and Harris v. Findlay, 59 Ohio App. 375, 18 N.E. 2d 413 (1938).

[129] Harris v. Findlay, 59 Ohio App. 375, 18 N.E. 2d 413 (1938); Circleville v. Neuding, 41 Ohio St. 465, 13 Ohio L. Bull. 378 (1885); Tiffin v. McCormack, 34 Ohio St. 638 (1878). Both the municipality and the independent contractor may be enjoined from permitting a nuisance. Bedford v. Cleveland Heights, 18 Ohio Op. 319 (1939) (city garbage used to maintain hog farm).

[130] OHIO GEN. CODE §2293-3 (1937); see also Shelby v. Clagett, 46 Ohio St. 549, 22 N.E. 407 (1889). In this case the cost of repairs could have been charged to the abutting owner. State ex rel. Turner v. City of Bremen, 117 Ohio St. 186, 158 N.E. 6 (1927); 118 Ohio St. 639, 163 N.E. 302 (1928) (Mandamus will lie against the city to compel payment of a judgment); *accord*, State *ex rel.* Public Service Co. v. Alliance, 52 Ohio App. 252, 3 N.E. 2d 698 (1935); State *ex rel* Hagenmeyer v. Pemberville, 38 Ohio App. 162, 175 N.E. 890 (1931). But mandamus will not lie to compel an act prohibited by statute. Fostoria v. State *ex rel* Binley, 125 Ohio St. 1, 180 N.E. 371 (1932).

early holding that the county commissioners were liable in their corporate capacity when the county was at fault[131] was overruled in 1857,[132] and since that time the doctrine has prevailed. The reason for the rule is that the county is considered a subdivision of the state, concerned with general matters, and partaking of the sovereign immunity.[133] If the county has benefited from the wrongful act, however, as it would in cases of patent infringement and negligent appropriation of another's property for the use of the county, then the immunity is not accorded.[134] It would seem that liability on the part of the county would usually result from statute.

Roads and Bridges

Ohio General Code Section 2408 provides in part as follows:

> . . . The Board shall be liable in its official capacity for damages received by reason of its negligence or carelessness by not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county or any money or other property due the county. . . .

This statute is a delegation of duties to county commissioners similar to the duties delegated to a municipal governing body under Ohio General Code Section 3714.[135] It will be noticed, however, that the liabilities and duties imposed are different. The municipality is required to keep the streets *open, in repair, and free from nuisance,* whereas the county is liable only when the road or bridge is not kept *in repair.*[136]

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[131] Commissioners of Brown County v. Butt, 2 Ohio 349 (1826).

[132] Hamilton County v. Mighels, 7 Ohio St. 109 (1857).

[133] *Ibid.*

[134] May v. Logan County, 30 Fed. 250 (N.D. Ohio 1887) (patent infringement); Painter v. Napoleon Twp., 156 Fed. 289 (N.D. Ohio 1907) (trustee in bankruptcy can recover preferential payment from Township Board, but no fraudulent payment was "found" in this case); Painter v. Napoleon Twp., 190 Fed. 637 (N.D. Ohio 1910).

[135] See note 23 *supra* for text of the statute.

[136] Milner v. County Commissioners, 14 Ohio N.P. (N.S.) 141, 28 Ohio Dec. 462 (1913). The conflicting duties are recognized in cases concerning bridges on county or state roads located within the municipality. Thus, in Youngstown v. Sturgess, 102 Ohio St. 480, 132 N.E. 17 (1921), the liability of the municipality for nuisance and of the county for failure to repair the bridge was recognized; *accord,* Youngstown v. Bradlyn, 123 Ohio St. 392, 175 N.E. 603 (1931); Mooney v. St. Marys, 15 Ohio C.C. 446, 8 Ohio C.D. 341 (1897); Newark v. McDowell, 16 Ohio C.C. 556, 9 Ohio C.D. 260 (1897); *cf.,* Piqua v. Geist, 59 Ohio St. 163, 52 N.E. 124 (1898) (holding that there was no duty on the county to repair the bridge which was within a municipality but not on roads constituting a part of the county or state system); Brink v. Columbus, 37 Ohio L. Bull. 22 (1897). City is not liable for maintenance of a bridge on a county or state road if the city doesn't receive part of the bridge fund. Other cases involving the

The Ohio courts adhere to the questionable rule that statutes in derogation of the common law must be strictly construed and at times have carried the rule to seemingly ridiculous extremes. Liability had been denied, for example, because it was not shown that a guard rail previously existed along the bridge, it being impossible to "keep in repair" something that never existed.[137] Similarly, since the statute imposed the duty to keep in repair bridges which were "established"[138] by the county, recovery was not allowed for negligence in the maintenance of a bridge "established" by another political unit and then turned over to the county.[139] Since these cases were decided, however, it has been held that liability could be predicated on the defective construction of the road originally and need not be confined to deterioration,[140] and that liability could be imposed for negligence in the repair of a former national road which has been turned over to the exclusive control of the county.[141] This is not to say that the strict construction rule has been abandoned. Many examples of its application can be found in recent cases. Liability, for example, is not imposed for maintaining a nuisance,[142] for blockading a road so that a firetruck cannot reach burning premises,[143] or for failure to maintain a road that is within the corporate limits of a municipality.[144]

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liability of both the county and municipality can be found *infra* note 148. The question of participation in the bridge fund is no longer significant since such fund is now nonexistent, 1945 OPS. ATT'Y GEN. (Ohio) No. 243.

[137] Milner v. County Commissioners, 14 Ohio N.P. (N.S.) 141, 28 Ohio Dec. 462 (1913).

[138] OHIO GEN. CODE §2408 (1937).

[139] Yunker v. Commissioners, 11 Ohio C.C. (N.S.) 527, 21 Ohio C.D. 552 (1907).

[140] Harris v. Ake, 252 Fed. 884 (N.D. Ohio 1917).

[141] Black v. Commissioners, 13 Ohio C.C. (N.S.) 252, 21 Ohio C.D. 659 (1909), *aff'd*, 88 Ohio St. 587, 11 Ohio L. Rep. 62 (1913).

[142] Spronk v. Campbell, 17 Ohio Op. 540, 5 Ohio Supp. 238 (1940) (Sand truck parked on county road during hours of darkness without lights); Day v. Manrod, 29 Ohio Op. 298, 13 Ohio Supp. 83 (1942) (No liability where truck connected with air compressor used to repair culvert blocked the road).

[143] Sheley v. Swing, 13 Ohio Op. 434, 1 Ohio Supp. 142 (1938), *aff'd*, 65 Ohio App. 109, 15 Ohio Op. 381 (1939).

[144] Sroka v. Green Cab Co., 35 Ohio App. 438, 172 N.E. 531 (1929), *dismissed*, 122 Ohio St. 45, 170 N.E. 637 (1930). Other cases in which liability of the county has been denied include: Bellard v. Commissioners, 31 Ohio App. 224, 167 N.E. 404 (1928) (no liability of county for state road, but found here it was still a county road); Daus v. Commissioners, 6 Ohio L. Abs. 418 (1927) (liability does not extend to rock ledge upon which abutment of bridge rests); Weiner v. Phillips, 103 Ohio St. 249, 133 N.E. 67 (1921) (no liability of county for highway under the exclugive control and jurisdiction of the state); Ebert v. Commissioners, 75 Ohio St. 474, 80 N.E. 5 (1907) (no liability for damages as a result of a horse taking fright at stones collected along the roadside). *Compare*

The roads included within the purview of Ohio General Code Section 2408 probably comprise all roads under the jurisdiction of the county.[145] An important element in determining county liability for road defects, as in the case of city liability for street defects, is the likelihood of endangering the general public in the ordinary use of the highway. Of course, in addition to the element of danger, there must be a statutory duty imposed on the county. In interpreting this statutory duty the courts are likely to restrict the meaning of the terms. The duty has been held to exist, however, where the defect was on the unimproved instead of the improved portion of the highway,[146] where constructive notice rather than actual notice was charged,[147] and where the territory within which the bridge was located was annexed by a municipality.[148]

Statutes specifically impose the duty of erecting guard rails or hedge fences at the ends of designated bridges, culverts, viaducts and wash banks.[149] Here again the statutes are strictly construed before liability is imposed and no duty rests on the commissioners to install guard rails at other than the specified places.[150] If how-

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Bales v. Commissioners, 30 Ohio App. 249, 164 N.E. 791 (1928); Commissioners v. Marietta Transfer and Storage Co., 75 Ohio St. 244, 79 N.E. 237 (1906) (no liability for negligence in the operation of a free ferry in lieu of a bridge); Johnson v. Grunkenmeyer, 8 Ohio N.P. 274, 11 Ohio Dec. 412 (1901) (not liable for failure to keep sidewalk in repair); Commissioners v. Brady, 61 Ohio St. 174, 55 N.E. 173 (1899) (county not liable when drawbridge constructed on defective model or mechanism); Commissioners v. Coffman, 60 Ohio St. 527, 54 N.E. 1054 (1899) (no liability when accident caused by an unusual use of the bridge even though it is in a state of disrepair).

[145] Whitney v. Niehaus, 4 Ohio App. 208, 21 Ohio C.C. (N.S.) 273 (1915), *motion denied*, 13 Ohio L. Rep. 76 (1915). *Compare* Smith v. Commissioners, 10 Ohio C.C. (N.S.) 115, 19 Ohio C.D. 610 (1905), *aff'd*, 73 Ohio St. 434 (1906) (holding that the duty of keeping ordinary *county* roads in repair is not imposed on the commissioners.)

[146] Starling v. Commissioners, 53 Ohio App. 293, 4 N.E. 2d 921 (1935); Stuart v. Commissioners, 30 Ohio App. 283, 165 N.E. 53 (1928); Guernsey County Commissioners v. Black, 25 Ohio C.C. (N.S.) 415, 24 Ohio C.D. 164 (1911), *aff'd*, 88 Ohio St. 587 (1913).

[147] Guernsey County Commissioners v. Black, *supra* note 146; Starling v. Commissioners, *supra* note 146.

[148] Interurban Ry. and Terminal Co. v. Cincinnati, 94 Ohio St. 269, 114 N.E. 258 (1916). Ohio General Code Section 2421 is in point. Both county and city may be liable. Lengyel v. Brandmiller, 130 Ohio St. 478, 40 N.E. 2d 909 (1942); 1945 OPS. ATT'Y GEN. (Ohio) No. 243 asserting that the maintenance and repair of bridges erected on state and county highways within municipalities is a joint obligation. Other cases involving the liability of both the county and municipality can be found *supra* note 136.

[149] OHIO GEN. CODE §§7563, 7564 and 7565 (1938).

[150] Walthall v. Commissioners, 18 Ohio L. Abs. 360 (1934) (no liability when car crashed beyond the point where guard rails were required); Riley v. Commissioners, 109 Ohio St. 29, 141 N.E. 832 (1923) (pipe under

ever, a guard rail has already been established at some other than the designated places, then liability can probably be imposed under Ohio General Code Section 2408 for failure to keep it in repair.[151] In order to permit recovery for failure to erect guard rails, it is not necessary to show that the rails would have actually prevented the vehicle from going over the side, but it is sufficient to show that they would have prevented the accident by warning the motorist.[152] Concern over the safety of the traveler plus an unwillingness to extend the coverage of the statutes beyond their express terms are common threads running through the cases.[153]

Mob Violence

In Ohio, counties are made liable to a certain extent for injuries and losses suffered at the hands of a mob. Applicable statutes in part provide:

> A collection of people assembled for an unlawful purpose and intending to do damage or injury to anyone, or pretending to exercise correctional power over other persons by violence and without authority of law, shall be deemed a 'mob' for the purpose of this chapter.[154]
>
> A person assaulted and lynched by a mob may recover, from the county in which such assault is made, a sum not

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roadway for drainage not a "culvert"); Kerr v. Bougher, 16 Ohio App. 434 (1922) (no duty to install guard rails along a stone wall more than eight feet high); Wyandot County v. Boucher, 98 Ohio St. 263, 120 N.E. 700 (1918) (perpendicular means greater than forty-five degrees); Commissioners of Franklin County v. Darst, 96 Ohio St. 163, 117 N.E. 166 (1917); Commissioners of Franklin County v. Kile, 96 Ohio St. 171, 117 N.E. 178 (1917) (no duty to erect barriers unless the approach is more than six feet high).

[151] This was intimated in Milner v. County Commissioners, 14 Ohio N.P. (N.S.) 141, 28 Ohio Dec. 462 (1913).

[152] Harrigan v. Commissioners, 13 Ohio App. 408, 31 Ohio C.A. 449 (1919); Zimmer v. Kennedy, 54 Ohio App. 361, 7 N.E. 2d 574 (1936); Slyder v. Commissioners, 133 Ohio St. 146, 12 N.E. 2d 407 (1938). The Slyder case is discussed in 11 Ohio Op. 167 (1938) and 13 Ohio Op. 351 (1938). Recovery is denied where insufficiency of the guard rail is not the proximate cause of the injury. Marsh v. Athens County, 6 Ohio L. Abs. 181 (1928).

[153] Other cases in point involving roads and bridges are: Robinson v. Swing, 70 Ohio App. 83, 36 N.E. 2d 880 (1939) (county not liable for failure to repair a road that was established without any affirmative action by the commissioners); Bales v. Commissioners, 30 Ohio App. 249, 164 N.E. 791 (1928) (recovery could be based on negligently permitting stone and sand to be piled on the highway). *Compare* Ebert v. Commissioners, 75 Ohio St. 474, 80 N.E. 5 (1907) (no liability when stones piled along the roadside frightened plaintiff's horse); Brownfield v. Clapham, 25 Ohio C.C. (N.S.) 443, 27 Ohio C.D. 424 (1916) and Gregg v. Clapham, 6 Ohio App. 363, 28 Ohio C.D. 167 (1917) (county liable where fence wire stretched across road by contractor); Billings v. Dressler, 5 Ohio N.P. 114, 7 Ohio Dec. 250 (1898) (county liable for failure to repair bridge approaches.)

[154] OHIO GEN. CODE §6278 (1945).

> to exceed five hundred dollars; . . . or, if such injury result in permanent disability to earn a livelihood by manual labor, a sum not to exceed five thousand dollars.[155]
>
> A person suffering death or injury from a mob attempting to lynch another person shall come within the provisions of this chapter.[156]

The statutes have been held to be penal in nature and in derogation of the common law, and therefore to be strictly construed.[157] The earlier and better rule was that they are remedial and therefore to be liberally construed.[158] Recovery seems to be limited to injuries received when a mob is engaged in activities directed toward abusive treatment of some actual or supposed criminal.[159] Either the object of the mob's fury himself or any other person injured by such mob can recover.[160] If the mob, however, is incited because of a labor dispute and intent on general lawless unconcerted vandalism, without being specifically motivated towards the punishment of a supposed criminal, no recovery is permitted.[161] Similarly, no recovery against the county is allowed where the mob is the result of an intense communist rally directed toward

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[155] OHIO GEN. CODE §6281 (1945).

[156] OHIO GEN. CODE §6283 (1945).

[157] Hammett v. Cook, 42 Ohio App. 167, 182 N.E. 36 (1932); Zmunt v. Lexa, 37 Ohio App. 479 (1930), *aff'd*, 123 Ohio St. 510, 176 N.E. 82 (1931).

[158] Phillips Sheet and Tin Plate Co. v. Griffith, 98 Ohio St. 73, 120 N.E. 207 (1918); Commissioners v. Beaty, 11 Ohio App. 111, 30 Ohio C.A. 391 (1919), *motion denied*, 17 Ohio L. Rep. 346, 64 Ohio L. Bull. 445 (1919). These cases have apparently been rejected in favor of the strict construction rule. Reynolds v. Lathrop, 133 Ohio St. 435, 14 N.E. 2d 599 (1938).

[159] Lexa v. Zmunt, 37 Ohio App. 479, *aff'd*, 123 Ohio St. 510, 176 N.E. 82 (1931); Reynolds v. Lathrop, 133 Ohio St. 435, 14 N.E. 2d 599 (1938); Hammett v. Cook, 42 Ohio App. 167, 182 N.E. 36 (1932).

[160] OHIO GEN. CODE §6283 (1945).

[161] Gray v. Gibson, 12 Ohio N.P. (N.S.) 673 (1912); Davis v. Commissioners, 8 Ohio App. 30, 28 Ohio C.C. (N.S.) 145 (1917). Apparently *contra*, Commissioners v. Beaty, 11 Ohio App. 111, 30 Ohio C.A. 391 (1919). It is interesting to note that Judge Vickery who drafted the amendment (enacted 93 Ohio Laws 161 (1898)) to the Act of 1896 (92 Ohio Laws 136), and who successfully represented claimant in *Caldwell v. Commissioners*, 62 Ohio St. 318, 57 N.E. 50 (1900), attempted to reconcile the cases by asserting that in the *Beaty* case the mob was attempting to exert correctional power over the non-striker for not participating in the strike. Hammett v. Cook, 42 Ohio App. 167, 182 N.E. 36 (1932). However, this explanation was apparently without merit and the supreme court later rejected any such broad definition of "correctional power." Recovery was denied to a plaintiff where a group of strikers beat him up under the misapprehension that he was a strike breaker. The ground for the decision was that the attackers were motivated by personal, selfish motives and not attempting to administer justice with their own hands in the interest of the public good. Reynolds v. Lathrop, 133 Ohio St. 435, 14 N.E. 2d 599 (1938).

general destruction and disorder rather than toward a specific lynching.[162] It would seem that the liability of the county for mob violence is very limited, and that the old-fashioned lynchings, where irate and misguided citizens seek to expedite punishment by taking the law into their own hands, are the only kinds of riots within the purview of the statutes. All types of disturbance do not qualify.[163]

Dog Bites

The county in Ohio is made liable by statute for personal injuries and losses as a result of dog bites. Ohio General Code Section 5840 provides that the owner of sheep, cattle and other animals may be compensated from the dog and kennel fund of the county for any losses resulting from an attack by a dog.[164] However, certain conditions precedent concerning the giving of notice and filing of the claim are established. Recovery is allowed even when the dog's owner suffers the loss, provided the dog was duly registered and was destroyed within forty-eight hours after discovery of the injury.[165]

Similarly, a person injured by a dog, cat, or other animal afflicted with rabies, if such injury has caused him to employ medical or surgical treatment, may recover such expenses from the county. In this case, an itemized account of the expenses must be presented at a regular meeting of the county commissioners within four months after such injury, and here again, apparently, an owner can recover for injuries inflicted by his own dog.[166]

Defense and Recovery

As already indicated, the responsibility of the county in tort is not great and generally must be predicated on statute. Though strictly not a matter of defense, the doctrine of strict construction bars recovery in many cases because the asserted liability is not

[162] Hammett v. Cook, 42 Ohio App. 167, 182 N.E. 36 (1932). Apparently, also, no recovery is permitted against the county where the destruction is directed towards the *property* of the individual rather than towards his person since recovery is allowed only for "lynchings" as defined in the statute. OHIO GEN. CODE §6278 and §6280 (1945). The attack on the home of a communist leader on March 30, 1948 (Columbus Dispatch, March 31, 1948) in Columbus illustrates violence not covered by the statutes. The county is the only governmental unit that is liable for mob violence, and it is liable only for personal injuries or death in accordance with the principles discussed.

[163] For comment criticizing this construction see *"Liability for Personal Injuries Airsing Out of Labor Disputes,"* 5 OHIO ST. L.J. 101 (1938); 11 Ohio Bar 675 (1938).

[164] OHIO GEN. CODE §5840 (1945).

[165] OHIO GEN. CODE §5841 (1945).

[166] OHIO GEN. CODE §5851 (1945); 1918 OPS. ATT'Y GEN. (Ohio) No. 1657.

within the literal terms of a statute. In the road and bridge cases, if the cause of action is clearly within the statute, the county is able to interpose the usual defensive pleas of contributory negligence and independent contractor. The rules governing these defenses are the same as previously discussed in relation to municipalities and are in accord with general tort law. Lack of funds and a legal means of procuring them have been stated to constitute a defense in what appears to be a dictum of a circuit court.[167]

In the mob violence cases, the county does not have any defense but is liable if a party has been injured by a mob within the scope of the statute. Similarly, liability is imposed in the dog bite cases —the county being made responsible for such losses, and the only question being whether or not the loss falls within the statute. In the mob violence cases, damages are awarded primarily on the basis of imposing a penalty on the county for failure to keep law and order, whereas in the dog bite cases recovery is clearly compensatory and measured by the actual loss incurred.

Other Local Units

The township, like the county, is considered a subdivision of the state government and is afforded sovereign immunity for negligence except in those instances in which liability is specifically provided by statute. Ohio General Code Section 3298-17 imposes liability on the board of township trustees for damages incurred by reason of the negligence or carelessness of the board in the discharge of its official duties. Although the statute is couched in broad terms,[168] it is clear from its position in the code and manner of enactment that it imposes liability only for negligence in the performance of the board's duties in respect to roads.[169] The rule of strict construction is likewise applicable here as with other statutes opposed to the common law.[170] Thus, in order to permit recovery, the petition must show that the road in question is a township road[171] and that the board committed the act while engaged in official duties.[172] The

[167] Commissioners v. Black, 25 Ohio C.C. (N.S.) 415, 24 Ohio C.D. 164 (1911), *aff'd*, 88 Ohio St. 587, 105 N.E. 767 (1913).

[168] Ohio Gen. Code §3298-17 (1947) provides:

> Each board of township trustees shall be liable, in its official capacity for damages received by any person, firm or corporation, by reason of the negligence or carelessness of said board of trustees in the discharge of its official duties.

[169] Ray v. Trustees, 49 Ohio App. 172, 195 N.E. 707 (1934). Liability was imposed in Gause v. Peeler, 41 Ohio App. 192, 180 N.E. 384 (1931). A discussion of the scope of the township's liability in relation to roads can be found in 1939 Ops. Att'y. Gen. (Ohio) No. 893.

[170] Ray v. Trustees, *supra* note 169. Washington Twp. v. Rapp, 50 Ohio App. 1, 197 N.E. 413 (1934).

[171] Burchnell v. Barton, 12 Ohio Op. 3, 2 Ohio Supp. 108 (1938).

[172] Berry v. Michael, 70 Ohio App. 426, 46 N.E. 2d 621 (1941).

statute apparently does not cover damages which result from wilful and wanton acts of the township's agents[173] or damages resulting from negligence in the operation of fire equipment.[174] Liability is imposed, however, for damages resulting from the negligent operation of road machinery[175] and for negligence in failure to warn travelers when the road is under construction.[176] The Ohio Attorney General has ruled that the township may purchase liability or property damage insurance upon township-owned motor vehicles.[177] The usual defenses of contributory negligence and assumption of risk are available to the trustees.[178]

The immunity of the sovereign, characteristic of the state government and its agencies, does not extend to corporations called into being by the voluntary action of individuals forming them for their own advantage, convenience and pleasure. Hence, an agricultural society, although receiving aid from the county treasury, is liable for negligence.[179] A board of education, on the other hand, is considered an agency of the state and carrying on duties for the general welfare and so is immune from liability for negligence.[180] Similarly a board of health is excused from liability in the absence of statute.[181]

The liability of local governments generally for torts inflicted

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[173] Washington Twp. v. Rapp, 50 Ohio App. 1, 197 N.E. 413 (1934).

[174] 1933 OPS. ATT'Y GEN. (Ohio) No. 180.

[175] Ferber v. Trustees, 47 Ohio App. 449, 191 N.E. 444 (1933); 1933 OPS. ATT'Y GEN. (Ohio) No. 807.

[176] 1928 OPS. ATT'Y GEN. (Ohio) No. 3082.

[177] 1931 OPS ATT'Y. GEN. (Ohio) No. 2995. This opinion impliedly overruled a contrary one which apparently was based on the erroneous assumption that no liability existed. 1928 OPS. ATT'Y GEN. (Ohio) No. 2172. The insurance however, must cover a contingency which if it happened would create liability or otherwise the purchase of such a policy would be an illegal expenditure of funds. 1943 OPS. ATT'Y GEN. (Ohio) No. 5949.

[178] Aalto v. Bishop, 8 Ohio L. Abs. 563 (1929).

[179] Dunn v. Agriculture Society, 46 Ohio St. 93, 18 N.E. 496 (1888).

[180] Finch v. Board of Education, 30 Ohio St. 37 (1876); Elias v. Norton, 53 Ohio App. 38, 4 N.E. 2d 146 (1936) (affirmed the non-liability rule but stated that a petition which alleged the members of the Board were individually operating a lunch room in their proprietary capacity stated a cause of action); Shaw v. Board of Education, 17 Ohio L. Abs. 588 (1934) (no liability for collapse of bleacher seats); Conrad v. Board of Education, 29 Ohio App. 317, 163 N.E. 567 (1928) (no liability to pupil injured by buzz saw in manual training class); Board of Education v. McHenry, 106 Ohio St. 357, 140 N.E. 169 (1922) (not liable for the negligent extraction of a pupil's tooth); Board of Education v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905) (not liable for the negligent taking away of lateral support.)

[181] OHIO GEN. CODE §4434 (1945) provides that compensation should be paid for infected property destroyed by order of the Board of Health. The rule of strict construction was applied in Clouse v. Coykendall, 29 Ohio C.A. 76 (1918).

on their employees, now primarily determined by proceedings under the Workmen's Compensation Act, is discussed separately[182] and therefore is omitted from this article.

APPRAISAL AND SUGGESTION

The foregoing survey of the Ohio law of tort liability of local governments should make one thing, if nothing else, clear: there is no definite pattern which may be traced through the cases and statutes. Instead of a fabric with warp and woof showing a symmetry which is pleasing to the eye, one finds a patch work with occasional glaring inconsistencies.

Let us assume that a sheriff's car, a police cruiser and a fire truck are returning from the scene of a train wreck. Let us further assume that the drivers are all negligent and by reason of their negligence seriously injure persons lawfully on the road. The county is not liable for the sheriff's tortious conduct because of the sovereign immunity which it shares with the state.[183] The city is not liable for the policeman's negligence since he was in the performance of his duties and the defense of governmental function prevails.[184] The city is liable for the negligence of the fireman because as to him the governmental function doctrine ceased to constitute a defense when the fireman left the scene of the emergency.[185]

The snow falls on the just and the unjust. It accumulates in hard, slippery bumps on the steps of the courthouse, the city hall and the building which serves as the headquarters of the municipal electric and waterworks department. On the same day persons are injured by falling on the steps of each of these buildings. The county is not liable to the one injured at the court house on any theory of nuisance or negligence.[186] The city is only liable to the one injured at the city hall if the snow and ice constituted a nuisance.[187] The city is liable to the one injured at the electric and water department building regardless of nuisance if negligence on the part of its employees caused the injury, since proprietary functions are involved.[188]

If good reasons could be given for the inconsistent results which follow in such cases as those mentioned, there would be no occasion for suggesting a change. The reasons which have usually

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[182] See Comment, *Workmen's Compensation For Public Employees in Ohio, infra* p. 508.

[183] *Supra* note 133.

[184] *Supra* note 103.

[185] *Ibid.*

[186] *Supra* notes 132 and 136.

[187] *Supra* notes 23 and 27.

[188] *Supra* note 8.

been given by the courts for holding various subdivisions not liable in tort may be reduced to a single proposition: the legislature has not so provided. The state's own immunity from suit can be removed by legislative enactment.[189] Therefore the more questionable immunity of any of its subdivisions may be removed at any time and to any extent which seems appropriate to the legislature. Similarly the overworked concepts of governmental and proprietary functions have nothing more substantial to support them than legislative inaction. In the first paragraph of Ohio General Code Section 3714-1 the distinction between the two types of functions is abolished insofar as the operation of vehicles on the highways in behalf of municipal corporations is concerned.[190] The second paragraph of the section retains the distinction for certain vehicles under certain circumstances. If it had not been added, a neat job of removing an outworn distinction would have been accomplished.[191]

When an individual is injured as a result of the negligent or other wrongful act of a public servant three possibilities are present: (1) the injured person may go uncompensated for his injury; (2) he may be required to look solely to the public employee for compensation; (3) the public body in behalf of which the employee acted may be required to make compensation as do other employers, whether individual or corporate. In actual practice there is frequently little difference in the results whether the first or second of these possible approaches is taken. The public employee who might be sued is not necessarily in a financial position to carry the burden of compensating for the injury. If a judgment against him will not be satisfied the injured person is in no better position than if the law permitted no judgment. Some public officers and employees are required to give bond and those injured by their tortious acts may have recourse against the bondsmen.[192] Because of the limited liability under such bonds and because most public employees are not required to give bond, it is safe to say that persons injured by wrongful acts of public employees will not be adequately compensated if the employer is given immunity.

If the choice, then, for practical purposes becomes one of leaving the injured person uncompensated in whole or in part or of placing the loss on the public body the answer would seem to be easy. The prevalence of insurance of all types, the existence of Workmen's Compensation funds and many other similar institutions bear witness to the fact that diffusion of loss is highly desir-

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[189] OHIO CONST. Art. I, §16.

[190] *Supra* note 103.

[191] *Ibid.*

[192] Maryland Cas. Co. v. McDiarmid, 116 Ohio St. 576, 157 N.E. 321 (1927); United States Fidelity & Guaranty Co. v. Samuels, 116 Ohio St. 586, 157 N.E. 325 (1927).

able. The writer of a recent article on accident liability has stated the matter succinctly as follows:

> Even where individual ruin and its wider consequences are not threatened, the equitable and wide distribution of a loss is all to the good, for a man's bottom dollar is his most valuable dollar, and each dollar added to that has a decreasing value to him. So that if a loss equals 100, less social disutility will result from letting one unit of it fall on each of 100 people than from putting it all on one person.[193]

It is difficult to believe that there are no better reasons which account for the fact that we still tolerate a policy of leaving deserving claimants uncompensated if their injuries are caused by public servants. Stripped of nonessentials the reasons appear to be either a nebulous fear of raids on the public treasury or simple inertia.

Studies made in recent years have shed considerable light upon the tort burden of municipalities.[194] The following excerpt is taken from a report of one of these studies:[195]

> The fear that the abolition of the tort immunity of municipal corporations would thrust an unbearable burden upon small municipalities is one of the chief obstacles in the way of further extension of liability. Until recently, no data existed in usable form which would tend either to prove or to disprove the basis of this fear. Indeed, the whole matter of tort liability in small towns and cities was shrouded in utter darkness. Fortunately, this deficiency has been relieved. The state-wide survey sponsored by the Bureau of Public Administration at the University of Virginia[1] together with several studies of individual cities in other states[2] have provided a basis upon which conclusions concerning the tort liability problems of small municipalities may be drawn.
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> The tort burden of small municipalities has been greatly exaggerated. Statistics based upon data from 189 municipalities with populations under 100,000 would seem to prove that the present burden of tort liability upon small

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[193] James *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L. J. 549, 550 (1948).

[194] Fuller and Casner, *Municipal Tort Liability in Operation,* 54 HARV. L. REV. 437 (1941); David, *Public Tort Liability Administration: Basic Conflicts and Problems,* 9 LAW & CONTEMP. PROB. 335 (1942); David and French, *Public Tort Liability Administration, Organization, Methods and Expense,* 9 LAW & CONTEMP. PROB. 348; Peterson, *Government Responsibility for Torts in Minnesota,* 26 MINN. L. REV. 293, 480, 700, 854 (1942).

[195] Warp, *Tort Liability Problems of Small Municipalities,* 9 LAW & CONTEMP. PROB. 363 (1942).

[1] WARP, MUNICIPAL TORT LIABILITY IN VIRGINIA (1941).

[2] Unpublished studies by Mr. Gus Levy of Austin, Texas, and by Mr. Mark E. Gallagher of Medford, Massachusetts, both of which were sponsored by the Committee on Public Administration of the Social Science Research Council.

municipalities is insignificant. The statistics are presented in the following table.[3]

TABLE I

ANNUAL TORT BURDEN OF SMALL MUNICIPALITIES

Municipality	1940 Pop.	No. of Awards	Amt. of Awards	Aver. Award	Amt. per 1,000 Pop.
Austin, Tex.	87,930	13	$ 2,961	$228	$ 34
Roanoke, Va.	69,287	3	292	97	4
Madison, Wis.	67,447	—	671	—	10
Medford, Mass.	63,083	32	10,205	319	162
Lynchburg, Va.	44,541	16	2,404	150	54
19 Virginia Cities*	273,170	10	2,466	247	9
165 Virginia Towns	216,757	6	1,452	242	7

* Not including Roanoke and Lynchburg.

> It is readily apparent from these figures that the only municipality with a sizable burden is the City of Medford, Massachusetts. And even there the annual burden is less than one and one-half cents (sic) per inhabitant.[4]

For the year 1946 the City Attorney of Columbus reported that the city had paid $4600 to satisfy five judgments for sidewalk defects, $1300 to satisfy a judgment for damages incident to condemnation of land for an alley, and $2771.64 to satisfy 58 claims for personal injuries and property damage, including $273 paid to police officers for personal property damage.[196]

For the year 1947 the City Attorney reported payment of a net total of $9300 to satisfy 8 judgments and $1480.78 to satisfy 60 other claims.[197] The totals for the two years, $8,671 and $10,781 respectively, seem quite small when one recalls that the city of Columbus has a population of approximately 340,000 and total receipts for the year 1946 of $18,361,702 and for the year 1947 of $20,117,407.95.[198]

It is safe to assume that every suggestion made in the past for relaxing the rule of immunity was met with the prediction that an unbearable burden would be the result. When the legislature in 1933 abolished the governmental-proprietary distinction for municipal vehicles other than those of the fire and police departments there was undoubtedly opposition based on fear of financial dis-

[3] The statistics are taken from the studies mentioned in notes 1 and 2, *supra*.

[4] It is interesting to note further that the burdens of Austin, Texas, and Lynchburg, Virginia, are high because of the commendable policy of the city attorneys in those cities of settling all legitimate tort claims rather than of forcing them into the courts.

[196] ANNO. REPORTS, Supp. to City Bulletin of Columbus, 1946.

[197] The report had not been printed when this article was written. For comparable statistics in Cleveland, see Schroeder, *Administration of Municipal Tort Liability in Cleveland*, 9 OHIO ST. L.J. 412 (1948).

[198] The city attorney reported that 171 cases were pending as of December 31, 1947, of which 115 were sewer pollution cases. The income figures for 1947 were obtained from the City Treasurer's office since the report had not been published at this writing.

aster. How ill founded were any such fears is indicated by (1) the fact that the statute has not been repealed nor amended in a way to lessen the municipal liability and (2) the above quoted figures from the City of Columbus which, although not conclusive, at least suggest the relative lightness of the burden.

Since liability of municipal corporations has been recognized in many situations as a result of Ohio General Code Sections 3714 and 3714-1, removing all immunity will not greatly affect them. Counties are liable at present for damages caused by their failure to keep roads or bridges in proper repair.[199] It is unlikely that removal of immunity in other cases would prove too costly to be continued as a policy.

The New York General Assembly in 1936[200] took a long step toward abolishing the immunity which public bodies had previously enjoyed. In 1941 after several years of experience the scope of the statute imposing liability was extended to cover vehicle accidents on the highways of the state instead of being limited to those occurring on the streets of the municipality.[201] The statute makes "every county, city, town, village and other subdivision" liable for negligence in the operation of vehicles owned by the unit if done in the scope of employment. There is nothing to indicate that such a law has imposed intolerable burdens upon the subdivisions of New York.

The leading exponent of the theory that sovereign immunity from tort liability is an anachronism and should be eliminated is Professor Edwin Borchard of the Yale School of Law.[202] He has prepared model statutes which might be enacted to accomplish the purpose.[203] One such model draft contains the following provisions:

> Section [1B] as used in this Act, the term "municipal corporation" includes every county, city, school district, district established by law and other political subdivisions of the state.
>
> Section [2B] Subject to the limitations of this Act, every municipal corporation of this state shall be liable in an amount not exceeding twenty-five thousand dollars (?) to every person who sustains damage to his property, or in an amount not exceeding Seventy-five Hundred Dollars to every person who sustains personal injury or death if the

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[199] OHIO GEN. CODE §2408 (1937), quoted supra p. 398.

[200] N. Y. Laws, 1936, c. 323, N. Y. GEN. MUN. LAW §50-6 (1942).

[201] N. Y. Laws, 1941, c. 852, N. Y. GEN. MUN. LAW §50-6 (1942). OHIO GEN. CODE §3714-1 (1938) has from the beginning covered accidents on highways as well as on streets but has always been limited to municipal corporations.

[202] Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform.* 20 A.B.A. J. 747-752, 793-794 (1934).

[203] Borchard, *Proposed State and Local Statutes Imposing Public Liability in Tort,* 9 LAW & CONTEMP. PROB. 282 (1942).

> damage to the property or injury or death was either (1) proximately caused by the wrongful or negligent act or omission of any officer of the municipal corporation acting within the scope of his authority, or (2) proximately caused by any defect or insufficiency in any public streets, highways, buildings, grounds, works, property, machinery, vehicle or appliance, provided such defect or insufficiency was due to the wrongful or negligent act or omission of such municipal corporation, officer or employee.[204]

The model act then provides in detail for notice and other matters incident to suit.[205]

It is probable that extension of liability or complete abolition of immunity would affect the smaller municipalities and subdivisions more seriously than the larger ones. It is also probable that the smaller towns and counties would present strong opposition to such a proposal if the effect of it were to leave them subject to indefinite liability. Professor Borchard has discussed this phase of the problem and has proposed the following statute to deal with it:

> Section [1L] In the case of a county, city, municipal corporation, school district, district established by law, or other political subdivision [i.e. municipal corporation] having a gross revenue from taxation from all sources of less than $250,000 per annum, the said county, city, municipal corporation, school district, district established by law, or other political subdivision [i.e. municipal corporation] shall contribute to the general fund of the state an amount per annum not less than two per cent of its gross revenue from taxation from all sources, in lieu of direct liability for private claims established by this Act; but in that event, the settlement, adjustment, and allowance of claims against the said subdivision shall be reviewed and may be revised by the State Administrative Board, and all suits arising out of the claim shall be brought against the state jointly with the county, city, municipal corporation, school district, district established by law, or other political subdivision [i.e. municipal corporation] primarily liable.[206]

With the change in the Federal law represented by the Federal Tort Claims Act[207] it seems an appropriate time to reconsider and to revise the state law pertaining to public liability for torts. Ohio might do that which has been done in the past, follow the lead of New York. It would be most enheartening if Ohio statesmen would follow the suggestions of Professor Borchard and lead us completely out of the wilderness of sovereign immunity.

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[204] *Id.* at p. 298.

[205] *Id.* at p. 299 *et seq.*

[206] *Id.* at p. 310.

[207] See Walker *Administrative Settlement of Claims Under The Federal Tort Claims Act,* 9 OHIO ST. L.J. 445 (1948); Comment, 9 OHIO ST. L.J. 471 (1948).